

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEITH HOLDER,

No. C 08-2572 CW (PR)

Petitioner,

v.

ORDER GRANTING PETITION FOR  
WRIT OF HABEAS CORPUS

BEN CURRY, Warden,

Respondent.

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INTRODUCTION

Pro se Petitioner Keith Holder, a state prisoner incarcerated at the Correctional Training Facility in Soledad, California, seeks a writ of habeas corpus under 28 U.S.C. § 2254, challenging the October 26, 2006 decision of the California Board of Parole Hearings (BPH) denying him parole at his fifth parole suitability hearing. Doc. No. 1 at 3 & 24. At the time he was denied parole in 2006, Petitioner had served approximately sixteen years on his seven to life sentence, over nine years past his minimum eligible parole date of May 13, 1997. Doc. No. 1-1 at 103.

On September 10, 2008, the Court issued an Order to Show Cause

1 why the writ should not be granted. Doc. No. 3. On January 8,  
 2 2009, Respondent filed an Answer. Doc. No. 4. On February 11,  
 3 2009, Petitioner filed a Traverse. Doc. No. 5.

4 After the matter was submitted, on April 22, 2010, the Ninth  
 5 Circuit issued its decision in Hayward v. Marshall, 603 F.3d 546  
 6 (9th Cir. 2010) (en banc), which addressed important issues relating  
 7 to federal habeas review of BPH decisions denying parole to  
 8 California state prisoners. On May 6, 2010, the Court ordered the  
 9 parties to file supplemental briefing explaining their views of how  
 10 the Hayward en banc decision applies to the facts presented in  
 11 Petitioner's challenge to the BPH's decision denying him parole.  
 12 Doc. No. 6. Respondent filed supplemental briefing on May 28, 2010;  
 13 Petitioner filed his on June 17, 2010. Doc. Nos. 7 & 8.

14 Having considered the entire record before the Court and all of  
 15 the papers filed by the parties, the Court GRANTS the Petition and  
 16 remands the matter to the BPH. Within thirty (30) days from the  
 17 date of this Order, the BPH must set a parole date for Petitioner  
 18 unless it finds new evidence, arising after the 2006 hearing, of  
 19 current dangerousness. See Pirtle v. California Board of Prison  
 20 Terms, No. 07-16097, 2010 WL 2732888 at \*8 (9th Cir. July 12, 2010).

#### 21 BACKGROUND

22 I. The Commitment Offense and Petitioner's State Court Challenges  
 23 to His October 26, 2006 Denial of Parole

24 The BPH summarized the facts of Petitioner's commitment  
 25 offense, as derived from pages two and three of the initial  
 26 probation report, as follows:

27 On May 17th, 1990, Kiomi Takazato . . . spent

1 the day with her friend [Petitioner] Keith  
2 Holder whom she ha[d] known for two years and  
3 who ha[d] many lady friends in the Japanese  
4 community. She left her baby in her home with  
5 her live-in housekeeper and babysitter,  
6 Mariquette Estelilla . . . . When [Takazato]  
7 returned home with [Petitioner] at 12 or 12:30  
8 a.m., she found the housekeeper, Estelilla bound  
9 and gagged. She was handcuffed to a pole in the  
10 living room. Estelilla told [Takazato] that a  
11 man came into her room about 11 p.m., grabbed  
12 her by the hand and led her into the living room  
13 where he handcuffed, gagged her, and blindfolded  
14 her. He told her not to call the police or he  
15 would kill everyone in the house. He then took  
16 the baby. [Petitioner] found a ransom note,  
17 which read, ["I want \$400,000, 24 hours. I  
18 will call. No cops or you never see baby.["]  
19 They decided not to call the police. Later in  
20 the morning, [Petitioner] told Kiomi that he had  
21 received a call from a man who said the baby was  
22 at the Compton Police Department and was all  
23 right; however, because the kidnapper threatened  
24 to return and kill everyone, they decided to  
25 tell the police that the baby had been taken by  
26 a friend, and that everything was okay. After  
27 they got the baby, they would then tell the  
28 police the truth. When they arrived at the  
Compton Police Department, the police separated  
[Petitioner and Takazato], and after questioning  
both of them, arrested [Petitioner]. At 11:35  
p.m. on May 17th 1990, witness Ronald Coleman  
called the police regarding a kidnapping. He  
told the police that the kidnapping was over a  
mafia-type drug deal and that the baby was from  
wealthy Chinese parents. He indicated that the  
kidnapper was Steve Rose. With the help of the  
witness, the police stopped Steve Rose at 11:45  
p.m. while he was driving a blue BMW and the  
victim's baby was found in the vehicle.

Doc. No. 1-1 at 13-14.

Following a jury trial, Petitioner was convicted of kidnap for  
ransom and sentenced to seven years to life in state prison. Doc.  
No. 1 at 2-3; Doc. No. 1-1 at 103. He was received by the  
California Department of Corrections and Rehabilitation on March 1,  
1991. Doc. No. 1-1 at 103. Prior to appearing before the BPH on

1 October 26, 2006, Petitioner had been denied parole four times. Id.  
2 at 24.

3 Petitioner unsuccessfully challenged the BPH's decision denying  
4 him parole for the fifth time in the state superior and appellate  
5 courts. Doc. No. 1-1 at 103-08. On April 30, 2008, the California  
6 Supreme Court summarily denied Petitioner's petition for review.  
7 Doc. No. 4-12 at 2. This federal Petition for a Writ of Habeas  
8 Corpus followed. Doc. No. 1.

9 II. The October 26, 2006 Parole Suitability Hearing

10 At Petitioner's October 26, 2006 parole suitability hearing,  
11 the BPH recited the facts of Petitioner's commitment offense and  
12 asked him to explain his involvement. Petitioner thanked the BPH  
13 for this opportunity and stated:

14 I'm totally responsible for everything that  
15 happened with this crime. And what caused me to  
16 . . . take part in this crime was that at the  
17 time, . . . I was in love with Kiomi and . . . I  
18 was running a small sight seeing tour business.  
19 And I knew at the time that I didn't . . . have  
20 the financial ability to afford the kind of  
21 lifestyle that she was used to. And the idea  
22 was my idea, and it was all about just trying to  
23 scare Mr. Takazato into thinking that the baby  
24 was going to be harmed and the baby was not  
25 going to be returned, and we was [sic] just  
26 actually trying to embezzle money from him, so I  
27 [could] invest the money into my business and  
28 try to afford a lifestyle that I know she was  
used to. So, I'm not going to shift blame to  
anyone. I'm fully responsible for what I've  
done, and I'm very sorry for what I've done. I  
think the record will reflect from the very  
first Board Hearing, I've always been  
straightforward and honest about my part in this  
crime. And I know I've done some things wrong.  
And of course if I can make it right, if I can  
change it, I would. I did that crime. It was  
something that I know that I should not have  
done and I was wrong for doing what I've done.

1 Doc. No. 1-1 at 15-16. Later in the hearing, Petitioner returned to  
2 the subject of his remorse for the crime and gave the BPH some  
3 insight into how his imprisonment had changed him, stating:

4 I know the difference between right and wrong.  
5 I have not lived all my life being involved in  
6 crime. . . . I've worked before. I'm from a  
7 very solid family. I understand the [gravity]  
8 of what I have done. I know that I can be [a]  
9 much better person, and I don't want to live the  
10 life of just living in prison or hurting other  
11 people. . . . I would like to do unto others  
12 that I would like others to do unto me. That's  
13 the way I'm going to live my life from the day  
14 [you decide] to give me a second chance. I'm  
15 not going to be in trouble anymore. I know  
16 that. I'm almost 50 years old . . . and this  
17 [is] not the way I want to live my life. So, I  
18 know that when I leave here, the day I leave  
19 here, I'm going to live my life as a productive  
20 member of society wherever I go. I'm never  
21 going to be in trouble again, because I don't  
22 want to be locked up and be away from my family.  
23 My mom is old. My dad is old. I don't want to  
24 be in prison when I lose them, you know? And I  
25 just know that I'm never going to be in trouble  
26 again. There's no doubt in my mind. I'm not  
27 from that kind of background. I got myself  
28 involved in a crime. I got caught, I did my  
time, and while I was here, I wanted to show  
people that I can be here without getting  
involved in the things that you know, plague  
most of the prison . . . . So, I believe that  
when I get out, I won't have a problem.

20 Id. at 39-40. Still later in the hearing, Petitioner added:

21 I'm trying my best. I'm doing my best, and I  
22 think that in [sixteen] years that I've been  
23 down in prison, I think I have proven that I can  
24 stay out of trouble. . . . I just want you to  
25 know that I'm going to do unto others that I'd  
26 like others to do unto me. And I understand  
27 that this is a serious crime. And I've always  
28 come here, and the times that I've [sat] in  
front of you, I've always been straightforward  
with you. But, there's nothing I can do to  
change what I've done [sixteen] years ago  
. . . . There's nothing I can do. But I can  
tell you I'm a better person today. And I just

1 want to be able to get out and take care of my  
2 mom . . . just whatever I have left. That's all  
3 I want to do. I'm not going to be in handcuffs  
4 again. I know that for a fact. I know you  
5 don't know that because I'm sitting here,  
6 because I did something terrible . . . to my  
7 friend. . . . But I'm telling you, I know I'm  
8 not going to be in trouble again, so whenever  
9 you're ready to give me that chance, I hope I'll  
10 be able to sit here in front of you and you say,  
11 Keith, it's your time, you know. There's  
12 nothing I can do. I can't change it. I can't  
13 change it. I'm very sorry for what I've done,  
14 and I think by just showing that I can be a  
15 better person because I'm from that environment.  
16 I'm not from the environment of drugs, alcohol,  
17 guns, killing people, you know, I've done  
18 something wrong. . . . it was a bad idea. I  
19 take full responsibility for what I've done.  
20 Full responsibility. I'm not shifting blame on  
21 anybody. . . . I know I did a terrible crime.  
22 . . . In my heart, . . . I know I'm going to be  
23 a better person . . . when I leave this  
24 place. . . . You [will] never pick up the  
25 newspaper and see my name in it again.

26 Id. at 58-59.

27 The August 2, 2006 psychological evaluation conducted in  
28 anticipation of Petitioner's October 26, 2006 parole suitability  
hearing by psychologist W.K. Marek, upon which the BPH relied in  
rendering its decision to deny Petitioner parole, substantiated his  
feelings of remorse, noting: "[Petitioner] took full responsibility  
for his role in the kidnapping. He exhibited remorse and had good  
insight into the harm that was caused. His remorse for his crime  
appears to be genuine and appropriate." Doc. No. 1-1 at 85; see id.  
at 41. The BPH also noted that Dr. Marek found Petitioner's  
potential for violence to be no higher than the average citizen in  
the community. Doc. No. 1-1 at 41; see id. at 85. Further, the BPH  
noted Dr. Marek's observation that Petitioner's involvement in the

1 commitment offense was "essentially an aberration" and that "there  
2 [were] no obvious or significant violence precursors for him."

3 Id. The BPH also observed that Dr. Marek commended Petitioner for  
4 his "continued participation in Alcoholics Anonymous" and recent  
5 completion of an Anger Management course, and noted that he did not  
6 have a mental health disorder that required treatment either during  
7 his incarceration or on parole. Doc. No. 1-1. at 85; see id. at  
8 41-42.

9 The BPH went on to discuss Petitioner's parole plans, citing at  
10 least fifteen recent letters of support he received from family  
11 members and friends, which included several firm offers of  
12 employment, and financial support, as well as a place to live should  
13 Petitioner be granted parole. See Doc. No. 1-1 at 44-51.

14 The BPH also noted that Petitioner's only prior contact with  
15 the criminal justice system was in 1984 when he received two years  
16 of summary probation for misdemeanor fraudulent use of a credit  
17 card. Doc. No. 1-1 at 19. The evidence at the hearing also  
18 reflected that Petitioner had not received any serious rules  
19 violation reports throughout the entire period of his incarceration,  
20 and that the last infraction he received was in 1999, some seven  
21 years earlier. Id. at 69-70. Finally, the BPH noted Petitioner's  
22 recent programming in prison, which included completion of the "Cage  
23 Your Rage" anger management program and Dr. Thomas Gordon's Family  
24 Effectiveness Training, Harmony in the Home self-help anger  
25 management program. Doc. No. 1-1 at 25-26. The BPH also recognized  
26 that Petitioner held several jobs while in prison, including Porter,  
27  
28

1 Adult Basic Education, Culinary and Janitorial, and that he  
2 "maintained good work reports" while employed.<sup>1</sup> Id. at 27.

3 Petitioner's attorney added that Petitioner does volunteer work in  
4 the prison. Id. at 27. The BPH also acknowledged Petitioner's  
5 longstanding participation in the Alcoholics Anonymous and Narcotics  
6 Anonymous Twelve-Step programs since 1995. Doc. No. 1-1 at 36.  
7 Petitioner explained that he has never had an addiction to drugs or  
8 alcohol, but described his participation in these programs as:

9 spiritual . . . I ma[k]e amends to all. . . . I  
10 made a list of all these people that I've harmed  
11 and [am] willing to make amends to them all,  
12 which is step eight, because I feel that [step  
13 eight is] very important for my life; [for] what  
14 I've done. And the program that I go to, NA and  
15 AA, it's a program that I go to and I listen to  
16 other people's . . . testimonies and things, and  
17 maybe I'll get something out of it, but I'm not  
18 a drug user. I've never been in alcohol  
19 problems, and I've never been involved in  
20 anything illegal when it[] [comes] to any kind  
21 of illegal substance. So if I go to AA, it  
22 helps me out spiritually. It helps me out with  
23 things . . . that I've done. . . . It helps  
24 . . . because I know that I've done some wrong  
25 things and I want to recognize those things.  
26 And I've recognized those things.

27 Id. at 37.

28 Regarding his participation in the twelve-step programs, the  
BPH's Deputy Commissioner Harmon asked Petitioner if he had  
memorized all twelve steps. Petitioner explained, "I have one to  
eight memorized, but I['m] going to be truthful, I really gave more

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<sup>1</sup> When asked if he had a current prison job assignment, Petitioner explained that he has not held a job since 2004 when he was transferred from North Facility and that he is on a waiting list for work because the institution has no available jobs. Doc. No. 1-1 at 26-27.

1 attention to step eight; make a list of all . . . to make amends to  
2 them all. I thought that was very important. And on step five is  
3 that I admit to God and to ourselves, and to other human beings the  
4 exact nature of my wrong." Doc. No. 1-1 at 36. Later in the  
5 hearing, Commissioner Harmon returned to the subject of Petitioner's  
6 participation in the twelve-step programs, which they apparently had  
7 discussed at Petitioner's prior parole suitability hearing in 2003:

8 I asked you about the steps and at the time [of  
9 your 2003 hearing], . . . I said to you, did you  
10 ever learn the steps? And you said, some of the  
11 steps. And I said to you, you don't know them  
12 all? All the years you've been in it and you  
13 don't know the steps? . . . And then you go to  
14 explain all the steps and all, but it was  
15 obviously a concern and all that. And we  
16 discussed the same things. So it's not that  
17 we're picking on you, it's just that we just  
18 can't get an understanding of why you're in the  
19 program, and yet, you still can't -

20 Id. at 54. At this point, Petitioner interrupted Commissioner  
21 Harmon, and said:

22 Look, Mr. Harmon, I told you that I enjoy  
23 going to the program. I listen to a lot of the  
24 testimonies that the guys [give] and I feel that  
25 it will help me in a way that, if I met someone  
26 someday that is involved in drugs or alcohol,  
27 and et cetera, I can share verbally the  
28 experiences that I have heard through  
29 testimonies from the other guys what drugs and  
30 alcohol do to them.

31 Id. Commissioner Harmon responded, "Okay, that's wonderful. That's  
32 wonderful. I guess what I'm worried about is another kidnapping."

33 Id. at 55. Commissioner Harmon continued:

34 No, I'm telling you right up front. What  
35 you did was one of the most conniving serious  
36 crimes that could happen to innocent people in  
37 their own home; a place of shelter, a place that  
38 should never ever be attacked. And if I have a

1 person that's sitting before me and I believe  
2 . . . that person's being deceptive, that's a  
3 real concern of mine. And so that's why I'm  
4 asking you these questions. Because . . . when  
5 I look through these [prior parole suitability  
6 hearing] transcripts, [I feel] I'm being snowed.  
7 That's what I look at is that there's a lot of  
8 verbiage going on, but nothing's happening. I  
9 mean everybody knows the words remorse and  
10 insight, and all that kind of stuff, but I want  
11 to get down to the nitty gritty because the  
12 crime that you committed is one of the worst  
13 crimes that can happen in my mind to an innocent  
14 child and people. So that's why I'm asking you  
15 these things.

9 Id.

10 At the conclusion of the evidentiary portion of the hearing,  
11 the BPH rendered its decision, and found that Petitioner was "not  
12 suitable for parole and would pose and unreasonable risk of danger  
13 to society or a threat to public safety is released from prison at  
14 this time." Doc. No. 1-1 at 76. The BPH explained the reasons for  
15 the one-year denial:

16 This was a cruel offense. Multiple victims were  
17 involved in the same incident. It was carried  
18 out in a pretty calculated manner . . . which  
19 demonstrated a callous disregard for human  
20 suffering, particularly related to the maid, Ms.  
21 Estelilla. The conclusions are drawn from the  
22 statement of facts, which was taken from the  
23 probation officer's report, pages two to three  
24 which I'm incorporating by reference. . . . As  
25 far as institutional behavior goes, the Panel  
26 believes that you have not yet sufficiently  
27 participated in beneficial self-help or therapy  
28 programs. And we do note the misconduct while  
incarcerated was sixteen 128A counseling  
chronos, the last of which was August 25th ,  
1999 for manipulating staff, which was more than  
seven years ago.

25 . . . .

26 Other information bearing unsuitability includes  
27 other factors of past mental state, past and

1 present attitude towards the crime, signs of  
2 remorse, involvement in any other criminal  
3 misconduct, which is reliably documented and any  
4 other relevant reliable information or  
5 circumstances, which taken alone, may not firmly  
6 establish unsuitability, but which when taken  
7 together contribute to a pattern which results  
8 in unsuitability at this time.

9 . . . . .

10 We really believe you're on the right track and  
11 [we] really want to emphasize that with you. We  
12 really feel that you've made excellent progress,  
13 and the Panel believes you just need to develop  
14 some further insight into your behavior related  
15 to the life crime and remorse for all the  
16 victims including Ms. Estelilla who was  
17 terrorized more than anybody else in the whole  
18 crime.

19 Id. at 77.

20 The BPH then made the following findings:

21 The prisoner needs further therapy in order to  
22 face, discuss, understand and cope with stress  
23 in a non-destructive manner. Until additional  
24 progress is made, the prisoner continues to be  
25 unpredictable and a threat to others.  
26 Nevertheless, the prisoner should be commended  
27 for his recent completion of Cage Your Rage and  
28 particularly for having no serious  
disciplinaries the entire time [he's] been in  
prison, however, these positive aspects of [his]  
behavior don't outweigh the factors of  
unsuitability at this time.

Id. at 78.

Commissioner Harmon concluded the hearing by stating the  
following:

I think I've been very clear to  
[Petitioner] what . . . my expectations of him  
would be. He can't put that many years into  
that particular program and not really gather  
from it what I think he should be able to. You  
know, . . . if you're going to come back to the  
Board, and I'm going to be on that Panel, I'm  
sure going to expect you to be able to at least

1 tell me those steps that don't apply to drinking  
2 and alcohol as you see them, but how the other  
3 ones may benefit you. Other than that, I'm  
4 wondering if the other programs you've been  
5 going through, you have not picked up on what  
6 those programs represent either. So you know,  
7 if you're going to come in and represent  
8 something, I sure want to know what you've  
9 learned from those programs. But other than  
10 that, I mean you know, in the big scheme of  
11 things, I do believe you're on the right track  
12 as the Commissioner said. You've got work to  
13 do. I can envision you at some point being  
14 released from prison and I encourage you to  
15 listen to what I say . . . in terms of what my  
16 expectations are . . . if you were going to come  
17 back before me. I was disappointed today. You  
18 know, you gave me the same song and dance you  
19 gave me a few years ago, and then I pull up the  
20 initial hearing and I see you did the same thing  
21 then. And I can pull out the other ones too,  
22 and I'm sure they're also talking about the same  
23 areas, so you know, one thing I don't want to do  
24 is mislead you. You're serving a life term and  
25 I'm not trying to play God, but I sure want to  
26 make sure that when you walk out that door that  
27 you're a different person than the person who  
28 came in. If that makes any sense to you. My  
first obligation is to public safety.

16 Id. at 79-80.

17 III. The State Court Decisions Regarding Petitioner's Challenges to  
18 the BPH's October 26, 2006 Denial of Parole

19 The state superior court affirmed the decision of the BPH to  
20 deny Petitioner parole. Doc. No. 1-1 at 103. The court noted:

21 The Board found the Petitioner unsuitable  
22 for parole after a parole consideration hearing  
23 held on October 26, 2006. The Petitioner was  
24 denied parole for one year. The Board concluded  
25 that the Petitioner was unsuitable for parole  
26 and would pose an unreasonable risk of danger to  
27 society and a threat to public safety. The  
board based its decision primarily upon his  
commitment offense.

28 The Court finds that there is some evidence  
to support the Board's findings that multiple  
victims were attacked during the commitment

1 offense and that the offense was carried out in  
2 a dispassionate and calculated manner.  
3 [Citations.] Ms. Estelilla was bound and gagged  
4 and made to fear for her life during the  
5 kidnapping. Additionally, Ms. Takazato's baby  
6 was kidnapped from his home. Although no one  
7 was harmed during the offense, these victims  
8 were certainly traumatized by the kidnapping.  
9 The Petitioner admits that he planned the  
10 kidnapping for a couple of weeks. He and his  
11 accomplice plotted together and committed the  
12 offense in a dispassionate and calculated  
13 manner.

14 Id. at 103-04 (emphasis added).

15 The court further found, however, that there was

16 no evidence to support the Board's finding that  
17 the commitment offense demonstrated an  
18 exceptionally callous disregard for human  
19 suffering. [Citations.] Although the  
20 kidnapping was certainly a very serious offense,  
21 it was not more aggravated or more violent than  
22 an ordinary kidnapping for ransom. Therefore,  
23 it did not demonstrate an exceptionally callous  
24 disregard for human suffering. [Citation.]

25 Id. at 104 (emphasis added).

26 The court further observed:

27 The Board also considered the Petitioner's  
28 prior grand theft conviction and the Board's  
perception that he needs more therapy and self-  
help in order to gain insight about his offense.  
While these factors may not justify a finding of  
unsuitability, the Board may properly consider  
them as relevant to a determination of whether  
the Petitioner is suitable for parole.

The Board also considered the Petitioner's  
post-conviction gains, including his  
participation in several anger management and  
other self-help programs; his two completed  
vocations; his multitude of job offers in the  
United States and Trinidad; as well as his  
commendable ability to remain free of any  
serious discipline throughout his incarceration.  
However, [the Board] still concluded that the  
Petitioner would pose an unreasonable threat to  
public safety. [Citation.] . . . The nature of

Petitioner's offense constitutes the modicum of evidence required to support the Board's finding of unsuitability. [Citation.]

Accordingly, the petition is denied.

Id. at 104-05 (emphasis added).

The state appellate court also affirmed the BPH's decision to deny Petitioner parole. Doc. No. 1-1 at 108. The state supreme court summarily denied Petitioner's petition for review. Doc. No. 4-12 at 2. This federal Petition for a Writ of Habeas Corpus followed. Doc. No. 1.

#### LEGAL STANDARD

In Hayward, the Ninth Circuit explained the law in California as it relates to parole suitability determinations:

The California parole statute provides that the Board of Prison Terms "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual." The crucial determinant of whether the prisoner gets parole in California is "consideration of the public safety."

In California, when a prisoner receives an indeterminate sentence of fifteen years to life, the "indeterminate sentence is in legal effect a sentence for the maximum term, subject only to the ameliorative power of the [parole authority] to set a lesser term." Under the California parole scheme, the prisoner has a right to a parole hearing and various procedural guarantees and rights before, at, and after the hearing; a right to subsequent hearings at set intervals if the Board of Prison Terms turns him down for parole; and a right to a written explanation if the Governor exercises his authority to overturn the Board of Prison Terms' recommendation for parole. Under California law, denial of parole must be supported by "some evidence," but review

1 of the [decision to deny parole] is "extremely  
2 deferential."

3 Hayward, 603 F.3d at 561-62 (footnotes and citations omitted).

4 The court further explained,

5 Subsequent to Hayward's denial of parole, and  
6 subsequent to our oral argument in this case,  
7 the California Supreme Court established in two  
8 decisions, In re Lawrence . . . and In re  
9 Shaputis, . . . that as a matter of state law,  
10 "some evidence" of future dangerousness is  
11 indeed a state sine qua non for denial of parole  
12 in California. We delayed our decision in this  
13 case so that we could study those decisions and  
14 the supplemental briefs by counsel addressing  
15 them. As a matter of California law, "the  
16 paramount consideration for both the Board [of  
17 Prison Terms] and the Governor under the  
18 governing statutes is whether the inmate  
19 currently poses a threat to public safety."  
20 . . . There must be "some evidence" of such a  
21 threat, and an aggravated offense "does not, in  
22 every case, provide evidence that the inmate is  
23 a current threat to public safety." . . . The  
24 prisoner's aggravated offense does not establish  
25 current dangerousness "unless the record also  
26 establishes that something in the prisoner's  
27 pre- or post-incarceration history, or his or  
28 her current demeanor and mental state" supports  
the inference of dangerousness. . . . Thus, in  
California, the offense of conviction may be  
considered, but the consideration must address  
the determining factor, "a current threat to  
public safety."

20 Hayward, 603 F.3d at 562 (footnotes and citations omitted).

21 After providing this background on California law as it applies  
22 to parole suitability determinations, the court then explained the  
23 role of a federal district court charged with reviewing the decision  
24 of either the BPH or the governor denying a prisoner parole.  
25 According to the Ninth Circuit, this Court must decide whether a  
26 decision "rejecting parole was an 'unreasonable application' of the  
27 California 'some evidence' requirement, or was 'based on an  
28

1 unreasonable determination of the facts in light of the evidence.'"  
2 Hayward, 603 F.3d at 562-63 (citations omitted); see also Cooke v.  
3 Solis, 606 F.3d 1206, 1208, n. 2 & 1213 (9th Cir. 2010) (applying  
4 Hayward and explicitly rejecting the state's argument that "the  
5 constraints imposed by AEDPA preclude federal habeas relief" on  
6 petitioner's claim; noting that in Hayward, the court "held that due  
7 process challenges to California courts' application of the 'some  
8 evidence' requirement are cognizable on federal habeas review under  
9 AEDPA").

#### 10 DISCUSSION

##### 11 I. California Law Regarding Parole Suitability Determinations

12 When assessing whether California's parole board's suitability  
13 determination was supported by "some evidence," the court's analysis  
14 is framed by the "regulatory, statutory and constitutional  
15 provisions that govern parole decisions in California." Cooke, 606  
16 F.3d at 1213 (citing In re Rosenkrantz, 29 Cal. 4th 616 (2002)); see  
17 Hayward, 603 F.3d at 561-62. Under California law, prisoners  
18 serving indeterminate life sentences, like Petitioner, become  
19 eligible for parole after serving minimum terms of confinement  
20 required by statute. In re Dannenberg, 34 Cal. 4th 1061, 1069-70  
21 (2005). Regardless of the length of the time served, "a life  
22 prisoner shall be found unsuitable for and denied parole if in the  
23 judgment of the panel the prisoner will pose an unreasonable risk of  
24 danger to society if released from prison." Cal. Code Regs. tit.  
25 15, § 2402(a). In making this determination, the BPH must consider  
26 various factors, including the prisoner's social history, past and  
27

1 present mental state, past criminal history, the base and other  
2 commitment offenses, including behavior before, during and after the  
3 crime, past and present attitude toward the crime and any other  
4 information that bears on the prisoner's suitability for release.  
5 See Cal. Code Regs. tit. 15, § 2402(b)-(d).

6 In considering the commitment offense, the BPH must determine  
7 whether "the prisoner committed the offense in an especially  
8 heinous, atrocious or cruel manner." Cal. Code Regs. tit. 15,  
9 § 2402(c)(1). The factors to be considered in making that  
10 determination include: "(A) Multiple victims were attacked, injured  
11 or killed in the same or separate incidents; (B) The offense was  
12 carried out in a dispassionate and calculated manner, such as an  
13 execution-style murder; (C) The victim was abused, defiled or  
14 mutilated during or after the offense; (D) The offense was carried  
15 out in a manner which demonstrates an exceptionally callous  
16 disregard for human suffering; (E) The motive for the crime is  
17 inexplicable or very trivial in relation to the offense." Id.

18 As the Ninth Circuit observed in Hayward, the California  
19 Supreme Court has held that, "the core statutory determination  
20 entrusted to the Board and the Governor [in determining a prisoner's  
21 parole suitability] is whether the inmate poses a current threat to  
22 public safety . . . ." In re Lawrence, 44 Cal. 4th 1181, 1191  
23 (2008). And, "the core determination of 'public safety' under the  
24 statute and corresponding regulations involves an assessment of an  
25 inmate's current dangerousness." Id. at 1205 (emphasis in original)  
26 (citing Rosenkrantz, 29 Cal. 4th 616 and Dannenberg, 34 Cal. 4th  
27  
28

1 1061). The court further explained that:

2 a parole release decision authorizes the Board  
3 (and the Governor) to identify and weigh only  
4 the factors relevant to predicting "whether the  
inmate will be able to live in society without  
committing additional antisocial acts." . . .  
5 These factors are designed to guide an  
assessment of the inmate's threat to society, if  
6 released, and hence could not logically relate  
to anything but the threat currently posed by  
7 the inmate.

8 Lawrence, 44 Cal. 4th at 1205-06 (citations omitted). The relevant  
9 inquiry, therefore, is:

10 whether the circumstances of the commitment  
offense, when considered in light of other facts  
11 in the record, are such that they continue to be  
predictive of current dangerousness many years  
12 after commission of the offense. This inquiry  
is, by necessity and by statutory mandate, an  
13 individualized one, and cannot be undertaken  
simply by examining the circumstances of the  
14 crime in isolation, without consideration of the  
passage of time or the attendant changes in the  
15 inmate's psychological or mental attitude.

16 In re Shaputis, 44 Cal. 4th 1241, 1254-55 (2008).

17 The evidence of current dangerousness "must have some indicia  
18 of reliability." In re Scott, 119 Cal. App. 4th 871, 899 (2004)  
19 (Scott I). Indeed, "the 'some evidence' test may be understood as  
20 meaning that suitability determinations must have some rational  
21 basis in fact." In re Scott, 133 Cal. App. 4th 573, 590, n. 6  
22 (2005) (Scott II).

23 Subsequent to Hayward, the Ninth Circuit issued decisions in  
24 Cooke, 606 F.3d 1206, and Pirtle, 2010 WL 2732888, both of which  
25 focused on the notion that the "some evidence" of current dangerous  
26 must be reliable. In Cooke, the court ultimately reversed the  
27 district court's denial of Cooke's challenge to the BPH's decision

1 denying him parole, finding that the BPH's stated reasons for  
2 denying parole did not support the conclusion that Cooke posed a  
3 current threat to public safety. Cooke, 606 F.3d at 1216.

4 Specifically, the court stated:

5 [E]ach of the Board's findings . . . lacked any  
6 evidentiary basis. Nothing in the record  
7 supports the state court's finding that there  
8 was "some evidence" in addition to the  
9 circumstances of the commitment offense to  
10 support the Board's denial of Petitioner's  
11 parole. The Parole Board's findings were  
12 individually and in toto unreasonable because  
13 they were without evidentiary support. When  
14 habeas courts review the "some evidence"  
15 requirement in California parole cases, both the  
16 subsidiary findings and the ultimate finding of  
17 some evidence constitute factual findings.  
18 Here, there was no evidence that reasonably  
19 supports either the necessary subsidiary  
20 findings or the ultimate "some evidence"  
21 finding. Accordingly, we hold that the state  
22 court decision was "based on an unreasonable  
23 determination of the facts in light of the  
24 evidence.'" Hayward, 603 F.3d at 563 (quoting  
25 28 U.S.C. § 2254(d)(2)). Cooke is entitled to a  
26 writ of habeas corpus.

27 Id.; see also Pirtle, 2010 WL 2732888 at \*8 (affirming the district  
28 court's decision to grant habeas relief, concluding, "In sum, there  
is no evidence in the record to support the Board's finding that  
Pirtle poses a current threat to public safety. The Board's stated  
reasons for the denial of parole either lacked evidentiary support,  
had no rational relationship to Pirtle's current dangerousness, or  
both.")

## 29 II. Analysis of Petitioner's Claim

30 Petitioner seeks federal habeas corpus relief from the BPH's  
31 October 26, 2006 decision finding him unsuitable for parole on the  
32 ground that the decision did not comport with due process. Doc. No.

1 1.

2 Respondent argues that Petitioner is not entitled to relief  
3 because he has not demonstrated that the state court decision was  
4 contrary to, or an unreasonable application of, the California "some  
5 evidence" standard, or that it was based on an unreasonable  
6 determination of the facts in light of the evidence. Doc. Nos. 4 &  
7 7. In its supplemental post-Hayward briefing, Respondent notes that  
8 the state appellate court was the highest state court to address the  
9 merits of Petitioner's claim in a reasoned decision. That decision  
10 read, in its entirety, "The court has read and considered the  
11 petition for writ of habeas corpus filed January 15, 2008. The  
12 petition is denied. The record submitted reflects some evidence to  
13 support the challenged decision. In re Dannenberg (2005) 34 Cal.  
14 4th 1061, 1071, 1080; In re Rosenkrantz (2002) 29 Cal. 4th 616, 664-  
15 665."

16 Because in its decision denying Petitioner relief, the state  
17 superior court provided not just a legal conclusion and unexplained  
18 case citations, but analysis as well, it is that decision that the  
19 Court analyzes under AEDPA. See LaJoie v. Thompson, 217 F.3d 663,  
20 669 n.7 (9th Cir. 2000); Williams v. Rhoades, 354 F.3d 1101, 1106  
21 (federal court may look to any lower state court decision that was  
22 examined, and whose reasoning was adopted, by the highest state  
23 court to address the merits of a petitioner's claim).

24 As the superior court noted in upholding the BPH's finding that  
25 Petitioner was unsuitable for parole, the BPH "based its decision  
26 primarily upon his commitment offense." The superior court  
27  
28

1 concluded that "[t]he nature of Petitioner's offense constitutes the  
2 modicum of evidence required to support the Board's finding of  
3 unsuitability." Doc. No. 1-1 at 103 & 105. As explained below,  
4 after careful review of the record, the Court finds that the state  
5 courts' approvals of the BPH's decision to deny Petitioner parole  
6 were an unreasonable application of the California "some evidence"  
7 standard, and were based on an unreasonable determination of the  
8 facts in light of the evidence presented in the state courts. See  
9 Hayward, 603 F.3d at 562-63.

10 Although the BPH relied almost solely on the commitment  
11 offense, it noted other reasons for a finding of unsuitability,  
12 which included "past mental state, past and present attitude towards  
13 the crime, signs of remorse and involvement in any other criminal  
14 misconduct." Doc. No. 1-1 at 77. But an examination of the record  
15 shows these findings are not only unsupported by any evidence in the  
16 record, but are, in fact, contradicted by it. See Cooke, 606 F.3d  
17 at 1216 (when habeas courts review the "some evidence" requirement  
18 in California parole cases, both the subsidiary findings and the  
19 ultimate finding of some evidence must have reasonable factual  
20 support); Pirtle, 2010 WL 2732888 at \*8.

21 In his August 4, 2006 psychological evaluation prepared for and  
22 submitted as evidence at Petitioner's October 26, 2006 parole  
23 suitability hearing, under the heading "Current Mental  
24 Status/Treatment Needs," Dr. Marek observed:

25 [Petitioner] was oriented to time, place  
26 and person, evincing no symptomatology. He was  
27 not depressed and exhibited congruent affect.  
28 He was calm and cooperative. His behavior was

1 appropriate. His is estimated to be in the  
2 average range of intellectual functioning. He  
3 exhibited good insight and remorse, especially  
as it relates to his crime.

4 Doc. No. 1-1 at 84. Under the heading "Clinical Observations/  
5 Comments/Recommendations," the psychologist observed:

6 [Petitioner] is competent and responsible  
7 for his behavior. He has the capacity to abide  
8 by institutional standards and has done so for  
9 the last several years. He does not have a  
10 mental health disorder which would necessitate  
11 treatment either during his incarceration or on  
12 parole. He is to be commended for his continued  
participation in [Alcoholics Anonymous]. Since  
his last hearing, he says he has completed  
another self-help group, Anger Management. No  
treatment recommendations are being made because  
he does not have a mental health disorder.  
Parole decisions should be based on custody  
factors.

13 Id. at 85; see id. at 41-42. The psychologist further noted that  
14 the "prognosis is positive for [Petitioner] to be able to maintain  
15 his current mental state in the community upon parole." Id. at 85.  
16 And, as noted above, Dr. Marek's evaluation indicated Petitioner did  
17 not require mental health treatment, either while in prison or on  
18 parole, a statement that lies in direct contrast to the BPH's  
19 factually unsupported conclusion that Petitioner "needs further  
20 therapy in order to face, discuss, understand and cope with stress  
21 in a non-destructive manner." Doc. No. 1-1 at 78.

22 In the area of Assessment of Dangerousness, the psychologist  
23 found that

24 [Petitioner's] violence potential is obviously  
25 lower than the average inmate based on his good,  
26 recent institutional adjustment. If released to  
27 the community, his violence potential is  
28 estimated to be no higher than the average  
citizen in the community. It appears his

1 involvement in the incident offense was  
2 essentially an aberration for him. There are no  
3 obvious or significant violence precursors for  
4 him.

5 Id. at 41; see id. at 85.

6 Petitioner's two prior psychological evaluations provided  
7 similar conclusions regarding his mental state and lack of need for  
8 treatment. In an evaluation dated December 5, 2002, under the  
9 heading "Current Mental Status/Treatment Needs," a different  
10 psychologist observed:

11 [Petitioner] was cooperative and alert. He  
12 was appropriately dressed and groomed. His  
13 speech was normally articulate and contextually  
14 meaningful. His mood and affect were within  
15 normal limits. His behavior was appropriate to  
16 content. His intellectual functioning was  
17 clinically estimated to be within average to  
18 above average range. There was no evidence of a  
19 mood or thought disorder. His judgment appeared  
20 to be sound.

21 Id. at 89. This psychologist concluded: "[Petitioner's] prognosis  
22 is positive for being able to maintain his current mental state in  
23 the community upon parole." Id. In yet another psychological  
24 evaluation dated March 27, 1996, a third psychologist concluded:

25 [Petitioner] has acquired a much more  
26 positive attitude over the past two-three years.  
27 There are no [serious disciplinary violations].  
28 There is no diagnosable psychopathology.  
Violence potential within the institutional  
setting has been much less than average and in a  
less controlled setting, such as return to the  
community, violence potential would continue to  
be much less than average.

29 Id. at 93.

30 Regarding Petitioner's signs of remorse, Dr. Marek, who  
31 conducted Petitioner's most recent psychological evaluation,  
32  
33

1 observed that he "took full responsibility for his role in the  
2 kidnapping. He exhibited remorse and had good insight into the harm  
3 that was caused. His remorse for his crime appears to be genuine  
4 and appropriate." Doc. No. 1-1 at 85; see id. at 41. And, as noted  
5 earlier, at the hearing, Petitioner spoke at length regarding the  
6 depths of his remorse over what he had done. See Doc. No. 1-1 at  
7 15-16, 20, 39-40 & 57-59.

8 In light of this evidence regarding Petitioner's past and  
9 present mental state and signs of remorse, as well as the  
10 conclusions of three psychologists that Petitioner's violence  
11 potential was no higher than that of the average citizen in the  
12 community, the Court finds no evidence to support the BPH's  
13 conclusion that Petitioner exhibited lack of remorse and poor  
14 insight into his crime. See Cooke, 606 F.3d at 1216; Pirtle, 2010  
15 WL 2732888 at \*8 ("[t]he record contains no evidence that  
16 contradicts [the] professional assessment [of the psychologist who  
17 concluded the petitioner] was neither unstable [n]or potentially  
18 dangerous"). Similarly, here, there was no reliable evidence to  
19 suggest that if released on parole, Petitioner would pose an  
20 unreasonable risk of danger to society or a threat to public safety.  
21 See Cal. Code Regs. tit. 15, § 2402(a).

22 The Court therefore concludes that the state courts'  
23 determinations that the BPH's findings constituted "some evidence"  
24 of current dangerousness was an "'unreasonable application' of the  
25 California 'some evidence' requirement, and was 'based on an  
26 unreasonable determination of the facts in light of the evidence.'"

1 Hayward, 603 F.3d at 562-63 (citations omitted); see Cooke, 606 F.3d  
2 at 1216; Pirtle, 2010 WL 2732888 at \*8. As a result, Petitioner is  
3 entitled to federal habeas relief.


4 CONCLUSION

5 For the foregoing reasons, the Petition for a Writ of Habeas  
6 Corpus is GRANTED. Within thirty (30) days from the date of this  
7 Order, the BPH must set a parole date for Petitioner unless it finds  
8 new evidence, arising after the 2006 hearing, of current  
9 dangerousness. Within ten (10) days thereafter, Respondent must  
10 file a notice with the Court confirming Petitioner's parole date.  
11 Within seven (7) days after the parole date, Respondent must file a  
12 notice informing the Court whether Petitioner was released on  
13 parole. The Court retains jurisdiction to enforce its Order.

14 The Clerk of the Court shall terminate all pending motions,  
15 enter judgment and close the file. Each party shall bear his own  
16 costs.

17  
18 IT IS SO ORDERED.

19  
20 Dated: 8/6/2010



CLAUDIA WILKEN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

KEITH HOLDER,

Plaintiff,

v.

BEN CURRY et al,

Defendant.

Case Number: CV08-02572 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 6, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Keith Holder  
E87291  
P.O. Box 689 - FW233  
Soledad, CA 93960

Dated: August 6, 2010

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk